

ELECTRONICALLY FILED
2012 Jun 06 PM 1:43
IN THE IOWA DISTRICT COURT FOR STORY COUNTY
CLERK OF DISTRICT COURT - STORY

DENNIS L. SMITH,)	CASE NOS. LACV045119, LACV046341
)	
Plaintiff,)	
)	
vs.)	
)	
IOWA STATE UNIVERSITY OF)	FINDINGS OF FACT, CONCLUSIONS
SCIENCE AND TECHNOLOGY and)	OF LAW AND RULING
STATE OF IOWA.)	
)	
Defendants.)	
)	

BE IT REMEMBERED that on March 20 through April 3, 2012, trial was held in Story County in this matter. The Plaintiff, Dennis Smith (“Smith”) appeared and was represented by counsel, William W. Graham and Aimee R. Campbell. The Defendant, Iowa State University of Science and Technology (“ISU”) and State of Iowa (collectively “ISU”) appeared and was represented by counsel, Diane Stahle and Jordan Esbrook. Defendant Pamela Reinig’s (“Reinig”) counsel Shawn Smith appeared on her behalf. Prior to submission of the case to the Jury, ISU agreed that Reinig was acting within the scope of her employment with respect to the Plaintiff’s claims and that, consequently, ISU would accept any liability of Reinig in connection with Smith’s claims of intentional infliction of emotional distress and violation of Iowa Code §70A.28. Smith then dismissed his claims against Reinig individually.

Following dismissal of the claims against Reinig, Smith’s only remaining claims were claims against ISU for intentional infliction of emotional distress and for violation of Iowa Code § 70A.28. The claim of intentional infliction of emotional distress was tried and submitted to the jury, and the jury returned a verdict of liability and damages in favor of Smith on that claim. Although the Court had previously determined, over Smith’s objection, that the claim under

Iowa Code § 70A.28 (referred to hereinafter as the “Whistleblower Claim”) is an equitable claim for determination by the Court, the parties stipulated at the close of evidence that the question of liability on that claim would be submitted to and decided by the jury. The jury returned a verdict of liability against ISU and in favor of Smith on that claim. The Court accepts and adopts the jury’s findings and verdict in all respects. Based upon the Court’s prior ruling, it remains for the Court, sitting in equity, to determine the appropriate remedy respecting the Whistleblower Claim.

I. FINDINGS OF FACT

The Court has given full consideration to the testimony and exhibits presented during trial. To the extent that testimony and evidence was conflicting, the Court has made assessments as to credibility. Specifically, the Court notes that it found the testimony of Smith, Chad Sanborn, Kim Stephens, Lisa Ailshie, Carol Gostele, Carol Melvin, Dr. Loren Zachary, Dr. Alan Russell and Mary Jo Glanville to be more credible than the witnesses of the defense to the extent that such testimony was in conflict. The Court’s Findings of Fact, based on the evidence, are set forth below. The Court finds the following to be true:

1. Jursidiction

This Court has jurisdiction of the subject matter of this cause of action as well as the parties.

2. Factual Background

In approximately April of 2001, Smith was hired by ISU as a Communications Specialist III in the Engineering, Communications and Marketing department (“ECM”) in the College of Engineering. Smith was promoted to a Communications Specialist IV in 2005. His supervisor was Reinig until January 2008, and then his supervisor was Eric Dieterle (“Dieterle”). Dean

Mark Kushner (“Kushner”) supervised Reinig and then Dieterle at relevant times. (Trial Exhibit 10)

From the date of his hire in 2001 until March of 2007, Smith’s employment record with ISU reflected exemplary service, with uniformly positive reviews and no warning or reprimands. (Trial Exhibits 1-5). Smith also received praise and awards for his work. (Trial Exhibit 6-9). In late March of 2007, Smith initiated a grievance related to actions of his supervisor, Reinig. The grievance asserted that Reinig had failed to fulfill a promise to request a reclassification of his position and it raised issues of mismanagement in dealing with staff and improprieties in the hiring of Dieterle. In addition, in late March of 2007 Smith made the first of a series of reports that Reinig was mismanaging the ECM. He reported that Reinig was improperly providing an organization, the Council for Advancement and Support of Education (“CASE”), with hundreds of thousands of dollars of unpaid ISU staff hours and resources for her own personal gain. (Trial Exhibit 15) Smith ultimately reported Reinig’s mismanagement, abuse of authority and financial misconduct to several individuals, including public officials and law enforcement. The jury has found, and the Court also finds, that as a result of Smith’s report to ISU’s President Gregory Geoffroy, ISU retaliated against Smith in violation of Iowa Code §70A.28.

Evidence presented by Smith also showed that Kushner was closely aligned with Reinig and supported her despite Smith’s reports. Notes from Heidi Eichorn in regard to Smith’s grievance, for which Kushner was a decision maker, indicate a bias against Smith prior to any formal meeting and stated, “Ultimately, we want Dennis to see that this grievance will not be successful.” (Trial Exhibit 26) Correspondence between Kushner and Ellen Reints indicates that specifically with respect to Smith’s reporting of mismanagement, abuse of authority or financial misconduct, Kushner exhibited a protective position with regard to Reinig, and a desire to give

her a “heads up” as opposed to any legitimate attempt to determine if there was wrongdoing. (Trial Exhibit 16). Evidence also indicated that Kushner was heavily invested in Reinig and was attempting to promote her to an important advancement position in the College, even after indications of Reinig’s wrongdoing were clear. (Trial Exhibit 63) Kushner’s alliance with Reinig extended to Dieterle, as indicated by Kushner’s attempts to promote Dieterle to Director of ECM as well despite Kushner’s knowledge of the improprieties with regard to Dieterle’s hire and Dieterle’s involvement in propagating false statements about Smith. (Trial Exhibit 63, Trial Exhibit 60)

3. Liability under Iowa Whistleblower Statute §70A.28

The jury found that ISU retaliated against Smith under the Iowa Whistleblower Statute, as instructed in Jury Instruction No. 11, and that Smith was entitled to damages in some amount, finding that:

1. The Plaintiff reported to a public official, Iowa State University President Gregory Geoffroy, that Pamela Reinig had committed a violation of a law or rule, mismanagement, a gross abuse of funds or abuse of authority;
2. That Plaintiff reasonably believed the matter he was reporting;
3. That Iowa State University took action or retaliated against the Plaintiff after August 16, 2007, when the president received the Plaintiff’s appeal of his first grievance.
4. The Defendant’s conduct was the proximate cause of the Plaintiff’s damage;
5. The amount of damage.

(Jury Instruction No. 11).

4. Report to Public Official

The Court accepts and adopts the jury’s finding that Smith reported mismanagement, abuse of authority and financial misconduct to a public official via his report to ISU President Gregory Geoffroy. On August 16, 2007, Smith informed President Geoffroy about Reinig’s

mismanagement, abuse of authority and financial misconduct. In the course of appealing his first grievance, Smith met with President Geoffroy's representative Tahira Hira and along with other issues, discussed Reinig's mismanagement, abuse of authority and financial misconduct of providing hundreds of thousands of dollars of staff hours and resources to CASE on an unpaid basis for her personal gain. It is undisputed that President Geoffroy is a public official pursuant to Iowa Code §70A.28.

5. Plaintiff Reported Information He Reasonably Believed to be True

The Court accepts and adopts the jury's finding that Smith reasonably believed the information he reported. The Court finds that no evidence was offered to contradict the fact that Smith reported what he reasonably believed was financial misconduct on the part of Reinig. Smith's report led directly to President Geoffroy ordering an internal audit, which as trial testimony established, ultimately led to Reinig's termination from employment with ISU. This is confirmed in President Geoffroy's correspondence of September 7, 2007 to Smith in which he specifically acknowledged: "Your appeal has raised other important issues that do not fall within the scope of a grievance, such as hiring practices and use of funds. I have decided to order an internal audit of ECM to review compliance with law and policy in ECM." (Trial Exhibit 66)

6. ISU retaliated against the Plaintiff

The Court accepts and adopts the jury's finding that ISU retaliated against Smith for his reporting. As a result of Smith's report, President Geoffroy ordered that an audit be initiated. (Trial Ex. 66) Communications between Reinig and Dieterle in the fall of 2007, shortly after Smith's report to President Geoffroy, indicate Reinig's concerns regarding "waiting for the other shoe to drop" (Trial Exhibit 80); allude to "changes approved by MJK" (Trial Ex. 83) and characterize Smith as a "cancer" and a "very real threat to personal safety." (Trial Exhibit 85).

The record contains evidence that the retaliatory conduct was part of a continuous pattern of wrongful conduct undertaken against Smith. The wrongful conduct was undertaken by several of Smith's superiors, including Reinig, Dieterle and Kushner. It involved characterizing Smith as a potential terrorist or mass murderer without any legitimate or objective basis, and reporting Smith to the ISU Department of Public Safety as a person capable of or contemplating workplace violence. Reinig was involved in reporting Smith to the ISU Department of Public Safety at least nine times. (Trial Exhibits 22, 27, 30, 32, 34, 40, 41, 45, 48) Dieterle submitted several memos characterizing Smith as a safety threat, the credibility of which was brought into question by his own trial testimony and testimony presented by Smith's witnesses. (Trial Exhibit 46, 89) Evidence established that, after the report to President Geoffroy, Reinig, Dieterle, Kushner and Christine Hobbs were involved in reporting Smith as a threat to safety in a retaliatory manner and without any objective basis. (Trial Exhibits 87, 89) Dr. Eugene Deisinger testified that the ISU Department of Public Safety investigated Smith on an ongoing basis, including in late 2007 and 2008 based on Reinig and others' reports. Smith's co-workers in the ECM that testified on his behalf, refuted Reinig, Kushner, Dieterle and Hobbs' allegations that there was any basis whatever for believing Smith was threatening in any way.

After Smith's report to President Geoffroy, in late 2007 Dieterle and Kushner were involved in preparing statements and reporting regarding Smith's potential for violence. (Trial Ex. 89) The evidence also shows that in late 2008 Kushner and Dieterle were involved in making negative statements about Smith. Dieterle successfully sought to have Smith removed from working on the MSE departmental newsletter "Elements" and other projects. Dieterle testified that he had nothing to do with that decision and that he was a proponent of Smith in that matter. However, Professor Russell's testimony refutes that testimony and calls into question Dieterle's

credibility. Kushner testified during an August 6, 2008 grievance hearing that multiple employees complained that Smith was threatening. Evidence indicates that Kushner and Dieterle inconsistently later recorded that Kushner was not aware that staff felt threatened by the Smith. (Trial Exhibit 106) Kushner's credibility was brought into question at trial based on documentary evidence that was inconsistent with his testimony related to knowledge of staff that felt threatened (Trial Exhibit 106) and related to an alleged meeting where he witnessed Smith get angry that appeared to be inconsistent with his testimony. (Trial Exhibit 26)

The Court specifically finds that the testimony of Dieterle and Kushner was largely not credible. Kushner's lack of credibility was especially apparent in matters relating to his recollection of his actions against Smith. The Court was struck with his defense of Reinig despite her confessed theft of ISU funds.

Dieterle's testimony was less profound, but it was obvious that his goal in the testimony was to protect himself. His testimony would occasionally intersect with the truth, but this was obviously more by coincidence than design.

Kushner also took actions or failed to take actions that adversely affected Smith's employment. He failed to comply with directives from President Geoffroy and Provost Hoffman that he immediately restore to Smith job duties that had been taken from him. (Trial Ex. 69) After September 28, 2007, Kushner failed to comply with a directive from President Geoffroy and Provost Hoffman that he restore Smith's salary to hard-funds (Trial Ex. 62, 69) after the funding for Smith's position had been changed to a less stable (soft) funding source by Reinig in a retaliatory manner. Defendants deny that the change in funding was retaliatory and was merely an accounting function. Yet, later events proved that the soft funding would be cut from ECM's budget in the reorganization of the department. Had the change not been made, Smith's fate

would have been sealed. In keeping with his alliance with Reinig and Dieterle and with knowledge that it would negatively impact Smith, Kushner promoted Dieterle to act as Smith's supervisor on an interim basis in January 2008, and then permanently in June 2008. An inference can be drawn that this action was retaliatory based on the fact that Kushner was aware of and participated in the prior false statements of Dieterle with regard to Smith in fall of 2007. Dieterle was already engaged in his own campaign to paint Smith as a dangerous man.

Smith's grievance process was tainted by retaliation, forcing him to continue to fight to protect his rights for a period of approximately three years. That process was ongoing after August 16, 2007 and in fact Smith's fourth grievance continued up to February 2009. The four grievances cannot be viewed in isolation. An appropriate inference can be drawn based upon the evidence, that retaliatory conduct by ISU affected the determination of Smith's grievances. A Committee Hearing Report dated November 20, 2007, (Trial Exhibit 84), the Provost's decision letter dated December 3, 2007 (Trial Exhibit 86), and President Geoffroy's Decision Letter dated January 16, 2008 (Trial Exhibit 92), reveal that ISU was engaged in stonewalling Smith regarding his grievance claims when they refused to address Reinig's wrongful conduct in altering or destroying Smith's employment records, despite the fact that they believed she had done so. This negative impact on the grievance process was also evidenced by the testimony of Interim Dean Jim Bernard ("Bernard") regarding his meeting with Smith. (Trial Exhibit 175) Bernard testified that he recalled Smith shouting and that the exchange was unprecedented. Bernard denied Smith's grievance finding that he could be a frightening individual. However, an audio recording revealed, and Bernard acknowledged during trial that Smith did not raise his voice and was professional during that meeting.

Smith's witness, Kim Stephens corroborated Smith's testimony and testified that he was treated differently after his report to President Geoffroy, and that he received reduced work assignments throughout late 2007, 2008 and 2009. The elimination of Smith's job and ISU's decision not to rehire him were retaliatory. Smith was given notice of termination in May 2010 and ultimately terminated from his employment in August of 2010. (Trial Ex. 136). ISU conceded in its Memorandum of Law in Support of its Motion for Judgment Notwithstanding Verdict, that the jury concluded that the Smith's termination was a result of retaliation for his reporting to President Geoffroy, which incorporates reporting activities qualifying under 70A.28 from August 2007 to December 2008 inclusive. The Court agrees with that finding and adopts it.

Dieterle made the determination that Smith's position would be eliminated. Testimony established that the ECM was the only unit to have all staff terminated and the only unit to have its own reorganization plan. Despite the fact that the unit was purportedly eliminated, the Director of the ECM, Dieterle, was not terminated. A new unit called Engineering College Relations ("ECR") was created. Dieterle determined that "new" job descriptions were required to create "new" positions rather than retaining any existing staff besides himself. Smith testified that this was done in order to terminate him and get around existing ISU policies that would prevent doing so and retaining a part-time writer, Jessie Strawn, full-time. Witnesses for Smith corroborated his testimony by testifying that it did not make business sense to eliminate entirely the only cost-recovery unit in the College of Engineering based on budgetary concerns. Smith testified that ISU counsel, Paul Tanaka, had been attempting to get Smith to leave his position in the ECM in 2008. That supports the fact that ISU was engaged in continuous attempts to get rid of Smith. The testimony of Dean Wickert that the elimination of ECM was his decision was brought into question by evidence suggesting that dissolution had been discussed by Dieterle

prior to Wickert becoming Dean, in approximately September of 2008 in response to an “organizational dilemma.” (Trial Exhibit 114) It is an appropriate inference that Smith was the “organizational dilemma.” Documentary evidence also suggests that contrary to ISU’s testimony, the determination was made as early as January of 2009 that Smith would be terminated. (Trial Exhibit 130)

ISU also failed to rehire Smith despite the fact that he was qualified and a senior full-time employee. Dieterle testified that he had determined the job descriptions for the purportedly new positions. Smith testified that Dieterle had tailored them to favor a part-time writer, Jessi Strawn. Smith also testified that work had been removed from him prior to the termination and assigned to Strawn in anticipation of his termination. ISU’s witnesses testified that a committee was formed to review applications for the position of communication specialist, purportedly to prevent any bias and lend legitimacy to the hiring. However, according to defense witness John Glover, the committee in fact met with Dieterle prior to this process. Ultimately the committee did not make a recommendation or determine whom to hire; rather, the decision was made by Dean Wickert, who acknowledged that he had been briefed on Smith’s lawsuit against ISU upon taking his position as Dean.

The Court summarizes the above and finds that each action set forth below constitutes retaliation in violation of Iowa Code §70A.28:

a. False Statements

After August 16, 2007, ISU, by and through its employees, made and published the following false statements indicating that Smith was dangerous, frightening, mentally and emotionally unstable and potentially violent:

- i. November 21, 2007 communication from Reinig to Dieterle, characterizing Smith as a “cancer” and a “very real threat to personal safety.” (Trial Ex. 85)

- ii. December 4, 2007 Reinig report to ISU Department of Public Safety, falsely characterizing Smith as “obsessed” and irrational, raising safety concerns, and discussing weapons and strategies needed “in case Dennis confronts me in a threatening manner.” (Trial Ex. 87)
- iii. Meetings and memoranda from Dieterle to Kushner regarding Smith, characterizing him as a threat, expressing fears of his demeanor and potential to become physically threatening, and comparing him to the “Omaha mall shooter.” (Trial Ex. 89)
- iv. Dean Kushner testified during an August 6, 2008 grievance hearing that multiple employees complained that Smith was threatening. Evidence indicates that Kushner and Dieterle inconsistently later recorded that Kushner was not aware that staff felt threatened by the Smith. (Trial Exhibit 106)

b. Altered and less favorable working conditions:

- i. After September 28, 2007, Kushner failed to comply with directives from President Geoffroy and Provost Hoffman that he immediately restore to Smith job duties that had been taken from him. (Trial Ex. 69) Those duties were not restored for at least another seven months;
- ii. After September 28, 2007, Kushner failed to comply with a directive from President Geoffroy and Provost Hoffman that he restore the Smith’s salary to hard-funds (Trial Ex. 62, 69);
- iii. Kushner promoted Dieterle to act as Smith’s supervisor on an interim basis in January 2008, and then permanently in June 2008;
- iv. The ECM secretary Kim Stephens testified that Smith received fewer assignments on a continuing basis throughout 2007, 2008 and 2009;
- v. Dr. Alan Russell testified that Dieterle was involved in removing the Smith from his duties with the Materials Science and Engineering department (“MSE”) in October of 2008 based on his participation in a meeting for that purpose. Dr. Russell also testified that it came as a surprise to him as the editor of the MSE newsletter and that he had only good experiences Smith interpersonally and with his writing.

c. Termination of Employment

Smith was given notice of termination in May 2010 and ultimately terminated from his employment in August of 2010. (Trial Ex. 136).

d. Failure to Re-Hire

ISU failed to rehire Smith in August of 2010. ISU presented evidence claiming that it had engaged in a fair process to re-hire an individual to fill the position of Communication Specialist in the ECR department. However, Smith presented evidence that the reorganization process for ECM was retaliatory, and that College of Engineering officials had already determined that Smith was not going to be rehired in retaliation for his reporting. (Trial Ex. 130) The jury found Smith's evidence more credible on this issue and the Court agrees.

7. ISU's Retaliatory Conduct was the Proximate Cause of Plaintiff's Harm

The jury found that Smith was proximately caused harm as a result of retaliation for his August 16, 2007 report to President Geoffroy. The Court agrees with that finding and specifically finds that Smith was harmed in the following ways:

a. Emotional Distress

Smith presented evidence that he suffered extreme and severe emotional distress due to the ongoing and continuous conduct of ISU, by and through its employees, for a period of over three years. He testified that his emotional distress increased significantly in August of 2008 when Kushner testified during a grievance hearing that Smith was the subject of numerous employee complaints alleging he had made threats or was a threat. Smith testified that this was devastating to him. Smith's expert Dr. Kenneth Dodge testified that learning of this was extremely distressing for Smith and caused him severe agitation that was visibly apparent when he met with him during that time period. Dr. Dodge offered testimony that Smith experienced extreme distress as a result of ISU's conduct, and that he had concerns about Smith being suicidal.

Smith's witness Chad Sanborn testified that learning of these false characterizations caused extreme distress in Smith and that he was concerned about

Smith's well-being. Smith testified that his life was turned upside down by the wrongful conduct. He testified that his career with ISU represented a source of value and accomplishment in his life, and that it was extremely important to his well-being and the well-being of his family as the sole caregiver for and supporter of a disabled spouse. Smith testified that ISU's wrongful conduct shook him to his foundation, and took away his career and many of the professional relationships that offered him stability. During one of the grievance hearings, Smith became physically ill and left the room. He went to the rest room where a committee member found him. This is a poignant example of Smith's physical manifestations of the stress.

Smith also testified to physical manifestations of his severe distress, which testimony was corroborated by other witnesses. He testified that he lost weight. He overindulged in alcohol. He testified that because of the stress, he altered his life and routines to deal with the extreme distress he was experiencing. The defendants submitted evidence of Smith's moodiness at work and the adverse reaction of fellow workers, most notably Chris Hobbs.

Smith testified that he suffered depression as a result of the retaliation against him, and sought medical assistance for dealing with it from Dr. Dodge. Chad Sanborn, testified that he saw Smith experiencing severe distress, and suggested he seek help from Dr. Dodge. Others noticed the distress, including Professor Zachary, who wrote a letter to his dean advising him of Smith's distress.

b. Damage to Reputation

It is clear that Smith's personal and professional reputation was damaged by the retaliatory actions of ISU. Smith testified that, as a result of ISU's actions, he had no

supervisory references, despite years of dedicated and excellent service. As a result of the misconduct of his supervisors (Reinig, Dieterle and Kushner), his professional reputation as a prospective new hire was severely damaged. The impact of retaliatory actions is evidenced by his removal from working on the MSE newsletter. MSE Program Coordinator Carmen Garcia described him as having “several negative issues” on September 7, 2008. (Trial Exhibit 155) Professor Russell’s testimony established that Dieterle was not forthcoming as to his role in Smith’s removal from working with MSE. Finally, Interim Dean Bernard’s description of Smith’s conduct during a meeting was evidence of the negative image that ISU had inflicted on Smith’s reputation. Plainly, Bernard’s perception of Smith was influenced by the negative and retaliatory course of conduct by Reinig, Dieterle and Kushner. Bernard testified that he had regular meetings with Dieterle as Interim Dean and they discussed those issues. Bernard had also had a telephone conference with Kushner and discussed Smith prior to his own meeting with Smith which would have given Kushner the opportunity to provide such false characterizations. It is also clear that false statements about Smith had been shared with ISU administration in the past and it is an appropriate inference that Interim Dean Bernard had also been informed.

c. Loss of Income

Smith presented evidence that he received approximately \$70,000 per year in salary and benefits. (Trial Ex. 148) Smith has requested that the Court include a 4 percent annual increase in the salary award. The Court is not convinced that the reward is justified. The Court is aware that President Geoffroy gave this raise to Smith following a grievance proceeding. But the raises were adjustable based on an employee’s performance and ISU’s

budget. Also, the Court has not made an adjustment to present value so Smith will have the benefit of earnings on the lump sum. The Court will therefore not award the requested annual increase.

Smith testified that he had expected to work until age sixty-seven, September 21, 2019, or approximately nine more years. He testified that he had made efforts to find comparable employment but had been unsuccessful, in substantial part due to the lack of supervisory references based on the circumstances surrounding his termination. Smith has no realistic prospects of obtaining comparable employment.

II. CONCLUSIONS OF LAW

1. Iowa Whistleblower Statute§70A.28

Iowa Code §70A.28 is intended to protect public employees from retaliation for reporting a violation of rule or law, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Iowa Code §70A.28(2) states, in part, that:

A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in a state employment system administered by, or subject to approval of, a state agency as a reprisal for..... a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the office of citizens' aide, or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Iowa Code §70A.28 provides for a private right of action and civil remedies against persons who violate section 2. The Iowa Supreme Court has found that Iowa Code §70A.28 “reveals an umbrella of protection from retaliatory discharge” with remedies that include “affirmative relief

including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorneys fees and costs.” The Court is entitled to the reach and flexibility required to establish equity between the parties in order to do complete justice. Moser v. Thorp Sales Corp., 256 N.W.2d 900, 907 (Iowa 1977).

Here, justice is properly accomplished by an award compensating Smith for the losses established at trial:

a. Emotional Distress

The Court concludes that Smith is entitled to an award of monetary damages by way of restitution and compensation for emotional distress he has suffered as a result of ISU’s retaliatory actions in violation of Iowa Code §70A.28. The jury found that ISU was liable to Smith for damages for intentional infliction of severe emotional distress in the amount of \$500,000.00. That award presumably incorporates damages from conduct that constituted a violation of the Whistleblower Statute as well as conduct that did not violate the statute. In order to avoid duplication of damage awards, the Court has separately considered the extent of Smith’s severe emotional distress that would have resulted from ISU’s retaliatory conduct. Thus the total judgment for emotional distress damages, including both the jury award and the Court’s order in equity, is \$500,000.00.

b. Damage to Reputation

The Court finds and concludes that Smith suffered damage to his professional and personal reputation as a proximate result of ISU’s reprisals in violation of Iowa Code §70A.28 and awards Smith restitutionary damages for that loss in the sum of \$150,000.

This Court recognizes that Smith’s original complaint included a separate claim for defamation that is now unavailable to Smith on the basis that the State of Iowa has

certified and/or stipulated that the conduct at issue was done within the scope of employment, and that the State has not waived sovereign immunity for defamation claims. Although ISU claims that it cannot be held liable for damage to Smith's reputation, the damage or results arising from specific retaliatory conduct in violation of Iowa Code §70A.28 are damages for which ISU and the State of Iowa have waived immunity. There is meaningful and substantial distinction between a simple claim for defamation, which requires no showing of a specific motive, and a claim of unlawful reprisal which is based on proof of a particular retaliatory motive. The policy reasons supporting Iowa Code §70A.28 weigh in favor of an inclusive interpretation as to conduct in violation of that section and the harm caused by such conduct. Thus, even though ISU cannot be held liable to Smith for defamation it can be held liable to Smith for wrongful and retaliatory conduct under Iowa Code §70A.28, and the harm proximately caused thereby, including harm to reputation.

c. Loss of Income

The Court finds and concludes that Smith has sustained lost income as a result of ISU's reprisals in violation of Iowa Code §70A.28 and that he should be compensated for his lost income, \$70,000 per year as follows:

- i. Back-Pay from the time of Smith's loss of employment in August 2010, to the date of trial March of 2012 (Trial Ex. 148):

Year 1 (August 2010 to August 2011): \$70,000.00
Year 2 (August 2011 to March 2012): \$40,737.22

Total: \$110,737.22

ii. Front-Pay from the time of Trial to Smith's expected retirement at age sixty-seven, September 21, 2019, approximately seven and one-half years at \$70,000 per year (Trial Ex. 148):

Year 2 (March 2012 to August 2012): \$29,262.78
Year 3 (August 2012 to August 2013): \$70,000.00
Year 4 (August 2013 to August 2014): \$70,000.00
Year 5 (August 2014 to August 2015): \$70,000.00
Year 6 (August 2015 to August 2016): \$70,000.00
Year 7 (August 2016 to August 2017): \$70,000.00
Year 8 (August 2017 to August 2018): \$70,000.00
Year 9 (August 2018 to August 2019): \$70,000.00
Year 10 (August 2019 to September 2019): \$4,027.40

Total: \$523,290.18

iii. These amounts do not take into account any income Smith may receive from any other employment; however, the evidence establishes that Smith has not been able to find full-time employment for nearly two years, since his termination in August of 2010. No evidence was presented to suggest that he is likely to find such employment, being very close to retirement age and given the controversial circumstances associated with his termination.

iv. These amounts also do not take into account Smith's prospects for advancement or obtaining more favorable employment.

d. Attorney Fees and Costs

An award of reasonable attorney fees and costs is also justified in order to do justice and equity between the parties. This Court will consider attorney fee and cost applications submitted by Smith within thirty (30) days, and any resistance thereto by the

Defendant, and an award of reasonable attorney's fees and costs will be made based thereon.

III. RULING

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
as follows:

The Court hereby enters Judgment on the jury's verdict in favor of the Plaintiff against the Defendant, ISU for severe emotional distress in the amount of \$500,000.00, and, in addition thereto, Judgment is Hereby Entered, for violation of Iowa Code §70A.28 in the amount of \$784,027.40. The Plaintiff shall also have judgment for court costs, an award of attorney fees and expenses to be determined at a later time. Thus the total Judgment entered in this matter is \$1,284,027.40 plus court costs, attorney fees and expenses.

Copies to:

William W. Graham
Graham, Ervanian & Cacciatore, L.L.P
317 Sixth Avenue, Suite 900
Des Moines, IA 50309

Diane M. Stahle
Special Assistant Attorney General
Hoover Building, Second Floor
1305 East Walnut Street
Des Moines, IA 50319

Shawn Smith
P.O. Box 523
Ames, IA 50010



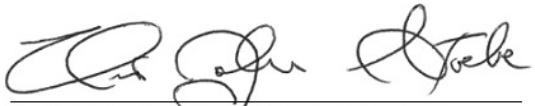
State of Iowa Courts

Case Title: DENNIS SMITH VS IA STATE BD OF REGENTS,ISU,PAMELA REINIG,ETA

Case Number: LACV046341

Type: OTHER ORDER

So Ordered



Kurt J. Stoebe, District Court Judge,
Second Judicial District of Iowa